

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ELIZABETH CIRVES,

Defendant.

OPINION AND ORDER

12-cv-429-bbc

07-cr-149-bbc

On January 23, 2012, defendant Elizabeth Cirves moved for a sentencing reduction under 18 U.S.C. § 3582, based upon the Sentencing Commission's retroactive change in the sentencing guidelines applicable to crimes involving crack cocaine. Her motion was denied because she is not eligible for relief under the statute. Defendant's guidelines were determined primarily by the amount of powder cocaine she possessed and are not affected by the change in the guidelines relating to crack cocaine.

Defendant moved for reconsideration of the order; the motion was denied on February 23, 2012. On June 18, 2012, she filed a notice of appeal, which is awaiting a decision in the court of appeals.

Defendant has now filed a motion for post conviction relief under 28 U.S.C. § 2255, contending that her sentence is illegal because the United States Supreme Court decided in United States v. DePierre, 131 S. Ct. 2225 (2011), that the term "cocaine base" refers to

any cocaine that is in base form. She says that her sentence violated this holding because the court took into consideration both the powder cocaine and crack cocaine she had possessed and DePierre prohibits a sentencing court from including both powder cocaine and crack cocaine when determining a sentence for a person charged with possession of both. I conclude that this motion is untimely and that even if it were not, it is not a claim on which defendant can prevail.

BACKGROUND

Defendant was charged in 2007 with two counts of possessing controlled substances with the intent to deliver. In count one, she was charged with possession of cocaine base (crack cocaine); in the second count, she was charged with possession of cocaine. The government filed an information under 21 U.S.C. § 851, advising the court and defendant that she had a prior controlled substance offense that would make the mandatory minimum sentence 10 years instead of the five that would otherwise apply to an offense involving five or more grams of cocaine base. 21 U.S.C. § 841(b)(1)(B)(iii).

Defendant entered a plea of guilty to the first count, admitting that the conduct in her case had involved more than five grams of “crack cocaine,” as that term is used in U.S.S.G. § 2D1.1. The probation office prepared a presentence report in which it recommended that defendant be held responsible for 7.77 grams of crack cocaine and about 6.3 kilograms of powder cocaine. Together, the drug quantity had a marijuana equivalent of 1,393.44 kilograms. Defendant was sentenced to a term of 151 months; her term was

later reduced on October 21, 2009 to 120 months after the government moved for a reduction to reflect her substantial assistance. Defendant did not appeal either her original sentence or the amended one.

OPINION

The initial question is whether the pendency of defendant's appeal from the denial of her motion for a reduction of her sentence under § 3582 bars the court from considering her § 2255 motion. United States v. Robinson, 8 F.3d 398, 405 (7th Cir. 1993) (sentencing court should not take up § 2255 motion while direct appeal of sentence is pending; disposition of appeal may render § 2255 motion moot). I conclude that it does not because the issues raised in the two motions are entirely different from one another. In this § 2255 motion, defendant is challenging the calculation of her sentence in light of a Supreme Court opinion that issued on June 9, 2011. Whatever action the court of appeals takes on her pending appeal of the denial of her § 3582 motion will not render this § 2255 motion moot.

This does not mean, however, that this motion can be entertained. Defendant faces another obstacle because her motion is untimely. 28 U.S.C. § 2255(f) sets out the starting dates for the running of the limitations period for the filing of a § 2255 motion: (1) the date on which the defendant's conviction became final; (2) the date on which the government-created impediment to filing such a motion has been removed; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Court and made retroactively applicable to cases on collateral review; or

the date on which the facts supporting the claim could have been recognized through the exercise of due diligence.

Defendant's sentence and conviction became final ten days after her amended sentence was imposed, which means that under § 2255(f)(1) her time for filing a post conviction motion expired on October 31, 2010. Defendant has not alleged that any government-created impediment prevented her from filing a motion earlier (in which case her motion might be timely under § 2255(f)(2)) or that she has discovered any new facts, so that the provisions of § 2255(f)(4) might apply. Instead, she bases her filing on her belief that the Supreme Court recognized a new right when it decided DePierre. However, that case was decided on June 9, 2011. Defendant did not file her § 2255 motion until June 19, 2012, which was ten days beyond the year she had for filing under § 2255(f)(3). She is not saved by the "mailbox rule" announced in Houston v. Lack, 487 U.S. 266 (1988), which counts a submission from a prisoner as timely if it is put into the institution mail on or before the due date, because she did not even sign her motion until June 12, 2012, three days after the year expired. Therefore, her motion is untimely and must be dismissed on that ground.

Even if the motion were not untimely, it would have to be dismissed because plaintiff has no valid claim under DePierre. In that case, the Court held merely that the term "base cocaine" encompasses any kind of cocaine in its base form: freebase, crack or coca paste. It did not say, as defendant seems to think, that when the sentencing court calculates the guidelines for any particular defendant, it cannot take into consideration all of the controlled

substances for which that defendant is held responsible whether they are crack cocaine, powder cocaine, heroin or anything else.

Defendant has not shown any other reason for finding that she was sentenced improperly when the court took into consideration both the crack cocaine and the powder cocaine that she possessed. Therefore, her motion must be denied.

ORDER

IT IS ORDERED that defendant Elizabeth Cirves's motion for post conviction relief under 28 U.S.C. § 2255, dkt. #62, is DENIED as untimely.

Entered this 3d day of July, 2012.

BY THE COURT:

/s.

BARBARA B. CRABB

District Judge